IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES GREEN

VS. C.A. NO. 05-2887

SUPERINTENDENT GRACE, ET AL.

MEMORANDUM OPINION AND ORDER

RUFE, J. DECEMBER , 2005

On June 15, 2005, pro se petitioner, a prisoner currently confined at the State Correctional Institution at Huntingdon, filed a petition for a writ of habeas corpus. On June 28, 2005, the case was referred to United States Magistrate Judge Thomas J. Rueter for a Report and Recommendation in accordance with Local Rule 72.1. On September 30, 2005, Magistrate Rueter issued a Report and Recommendation in which he recommended that the petition for a writ of habeas corpus should be dismissed and that no certificate of appealability should issue. On October 17, 2005, petitioner filed his written objections to the Report and Recommendation of Magistrate Rueter. Pursuant to 28 U.S.C. section 636(b)(1) and Fed.R.Civ.P.

72(b), this Court must make a de novo determination of those portions of the Report to which objections have been made. For the reasons which follow, the Objections are overruled, the Report and Recommendation is approved and adopted, and the petition for a writ of habeas corpus is dismissed.

FACTUAL AND PROCEDURAL HISTORY

On December 20, 1996 at approximately 5:00 p.m., petitioner and three other men confronted Ronald Spearman, Robert Willis and Mr. Willis' ten-year old son at 55th and Regent Streets in Philadelphia. Shots were fired and a total of thirteen firing cartridge casings were recovered: eight from a .380 caliber semi-automatic, one from a .22 caliber, and four from a 9mm semi-automatic. N.T., 10/22/99, at 54-55. A bullet struck Spearman in the back of the head from approximately two feet away, killing him. The police arrested petitioner on December 5, 1997. During his interview with police the day of his arrest, petitioner admitted to shooting Spearman with his .380 caliber semi-automatic weapon that he had retrieved from his aunt's house approximately one hour before the shooting occurred. N.T. 10/21/99 at 35, 47-52, 61-63, 69-84; 10/22/99 at 8-10, 12, 19-23, 31-33, 49-50, 54-55.

Petitioner was convicted on October 27, 1999 by a jury in the Court of Common Pleas of Philadelphia County of first degree

murder, criminal conspiracy and possession of an instrument of crime. He was subsequently sentenced to a mandatory term of life imprisonment for the murder conviction, with concurrent terms of one to five years for the possession conviction, and ten to twenty years for the conspiracy conviction. Petitioner took a direct appeal to the Superior Court of Pennsylvania. On July 31, 2001, the Superior Court affirmed the judgment of sentence in a Memorandum Opinion. Commonwealth v. Green, 785 A.2d 1027 (Pa.Super.Ct. 2001). Petitioner did not seek allowance of appeal to the Supreme Court of Pennsylvania.

On July 8, 2002, petitioner filed a pro se petition for collateral relief pursuant to the Pennsylvania Conviction Relief Act ("PCRA"), 42 Pa.Cons.Stat.Ann. sections 9541, et seq. The court appointed counsel who filed an amended petition. The PCRA court denied the petition on the merits on October 30, 2003. The Superior Court of Pennsylvania affirmed the denial in a Memorandum Opinion dated December 13, 2004. Commonwealth v. Green, 869 A.2d 7 (Pa.Super.Ct. 2004) (Table). On April 19, 2005, the Supreme Court of Pennsylvania denied allocatur. Commonwealth v. Green, 872 A.2d 1198 (Pa.2005)(Table).

In the petition sub judice, petitioner raises three grounds for relief: (1) the Commonwealth failed to rebut the defense claim of

self-defense; (2) the trial court failed to give a jury instruction on voluntary manslaughter; and (3) an eyewitness recanted his testimony when he allegedly gave conflicting testimony at the trial of petitioner's co-defendant. Petition at paragraph 12. The District Attorney of Philadelphia County filed a response to the petition, requesting that it be dismissed as untimely because it was not filed within the one-year statute of limitations as required by 28 U.S.C. section 2244(d). The District Attorney also requested that the petition should be dismissed on the merits.

DISCUSSION

In his Report and Recommendation, Magistrate Rueter found that the petition was timely filed. Neither petitioner nor respondent challenge that finding. Magistrate Rueter then noted the hurdles the petitioner would have to overcome under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), in order to be successful on the merits of his petition. The Magistrate outlined the pertinent provisions of the AEDPA as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Report and Recommendation at 5, citing 28 U.S.C. section 2254(d)(1) and (2). The Magistrate, citing Williams v. Taylor, 529 U.S. 362, 413 (2000), properly observed that most cases will not fit into section 2254(d)(1)'s "contrary to" clause, which is limited to direct and unequivocal contradiction of Supreme Court authority. Id. He also properly stated, again citing Taylor, that under the "reasonable application" clause of section 2254(d)(1), relief is appropriate only where the state court decision applied federal law erroneously or incorrectly and the state court decision is objectively unreasonable. Id. at 6.

The Magistrate then observed that under section 2254(d)(2), "petitioner must demonstrate that a reasonable fact finder could not have reached the same conclusion given the evidence. If a reasonable basis existed for the factual findings reached in the state court, then habeas relief is not warranted." Id., citing Campbell v. Vaughn, 209 F.3d 280, 290-91 (3d Cir. 2000), cert. denied, 531 U.S. 1084 (2001). "`A determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by

clear and convincing evidence.' " Report and Recommendation at 6-7, quoting 28 U.S.C. section 2254 (e)(1).

With respect to petitioner's first claim----that the Commonwealth failed to rebut his claim of self-defense---, Magistrate Rueter agreed with the respondent and the Pennsylvania Superior Court that the claim actually challenged the sufficiency of the evidence since a claim of self-defense, if accepted, would negate the element of malice necessary to establish first-degree murder. Report and Recommendation at 7. He noted that in evaluating a claim challenging the sufficiency of the evidence, a federal court must determine whether, after reviewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). Under Jackson, the credibility of witnesses, the resolution of conflicts of evidence, and the drawing of reasonable inferences from proven facts all fall within the exclusive province of the fact finder and, therefore, are beyond the scope of federal habeas sufficiency review." Id. at 319.

Magistrate Rueter, quoting extensively from the Superior Court decision, found that the state of the evidence was such that any rational trier of fact could have found the essential elements of first-degree murder beyond a reasonable doubt and that the

defendant did not act in self-defense. Report and Recommendation at 8-9. The Magistrate observed that "[t]he evidence showed that petitioner retrieved a gun and initiated a confrontation that led to the victim's death, the victim was shot in the back of the head leading to the conclusion that petitioner was not acting in self-defense, and petitioner did not retreat when he had the opportunity to do so. Considering the record as a whole in the light most favorable to the prosecution, a rational fact finder could have found the essential elements of the crime of first-degree murder." Report and Recommendation at 9-10.

In his Objections to the Magistrate's Report and Recommendation, petitioner simply reasserts in conclusory fashion that the record reveals that it was the victim and not the petitioner who fired the first shot.

Our de novo review of the record does not uncover any evidence to support petitioner's claim that the victim fired the first shot. On the contrary, the record reveals that it was indeed the petitioner who retrieved a gun, initiated the confrontation with the victim and shot him in the back of the head. See N.T. Trial, 10/21/99 at 72-77; 10/22/99 at 8-10. The only eyewitness to the crime, Robert Willis, testified that it was the petitioner who, with a gun in his hand, approached the victim and immediately opened fire.

Petitioner next claims that the trial court erred when it refused to give a jury instruction on voluntary manslaughter. Petitioner claims that he was entitled to such an instruction because he was acting in the "heat of passion" when he shot the victim. Magistrate Rueter rejected this claim on two grounds. First, he noted that "[t]he claim that the trial judge erred in failing to instruct on a particular issue raises purely a matter of state law which is not cognizable in a federal habeas corpus proceeding." Report and Recommendation at 11. Second, he found that even if such a claim was cognizable in a federal habeas proceeding, the evidence adduced at trial did not support such an instruction. Specifically, the Magistrate observed that petitioner had nearly five hours to cool off from a prior encounter with the victim before meeting him again and that the victim did not provoke the petitioner at the second meeting. Id. at 12.

In his Objections, petitioner simply states that the Magistrate erred in concluding that a federal habeas court may not consider whether the trial court erred in failing to give a particular jury instruction. This argument is without merit. The United States Supreme Court has held that federal courts reviewing habeas claims cannot "reexamine state court determinations on state-law questions." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Rather, a

federal habeas court is "limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Id. See also, Priester v. Vaughn, 382 F.3d 394, 402 (3d Cir. 2004)(federal court is bound by a state court's determination that a jury instruction comported with state law), cert. denied, 125 S.Ct. 974 (2005); Johnson v. Rosemeyer, 117 F.3d 104, 109 (3d Cir. 1997)("`The federal courts have no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension'" quoting Geschwendt v. Ryan, 967 F.2d 977, 888-89 (3d Cir. 1992).

Under the tenets of Estelle, supra, we agree with Magistrate Rueter that the trial court's decision not to give a voluntary manslaughter instruction does not raise any constitutional implications.

Even if the constitution was somehow implicated, our review of the evidence leads this Court to conclude that the evidence did not support a voluntary manslaughter instruction. Under Pennsylvania law, a person is guilty of voluntary manslaughter if he acted under a sudden and intense passion resulting from a serious provocation by the individual killed. 18 Pa.Cons.Stat.Ann. section 2503(a)(1). "Heat of passion" includes emotions such as anger, rage, sudden resentment or terror, which renders the mind incapable of

reason." Commonwealth v. Ragan, 560 Pa.106, 119, 743 A.2d 390, 396-97 (1999). The test to determine whether there was adequate provocation to reduce homicide to voluntary manslaughter is whether a reasonable man, confronted with the same series of events, would become impassioned to the extent that his mind was incapable of cool reflection. Commonwealth v. Eddowes, 580 A.2d 769, 772 (Pa.Super. 1990). Furthermore, there must be sufficient provocation in light of the time allowed for "cooling off." Id. at 772-73.

There is no evidence in the record to support petitioner's claim that he acted out of "heat of passion." On the contrary, the evidence reveals that the petitioner had five hours to cool off before encountering the victim a second time and that the victim did not provoke the petitioner.

In his final habeas claim, petitioner contends that eyewitness Robert Willis recanted his testimony that petitioner was the shooter when Willis testified at the trial of one of petitioner's co-defendants, Twain Bryant. In rejecting this claim, Magistrate Rueter quoted extensively from the Superior Court of Pennsylvania's Opinion in which the Superior Court found that Willis' testimony at Twain Bryant's trial was consistent with his testimony at petitioner's trial and therefore there was no recantation. Report and Recommendation

at 13-14. The Magistrate noted that under 28 U.S.C. section 2254(e)(1), the factual finding that there was no recantation is presumed to be correct and that petitioner could only rebut it by clear and convincing evidence. Magistrate Rueter found that "[petitioner] presents no argument as to why the state court's factual finding of no recantation was incorrect, nor does he identify any evidence to rebut the state court's finding."Id. at 15.

In his Objections, petitioner simply insists in conclusory fashion that Willis' testimony at petitioner's trial differed from his testimony at Twain Bryant's trial.

Petitioner fails to show that the state court's factual determination that there was no recantation was unreasonable in light of the evidence before it. He fails to identify any specific testimony in the record to rebut the state court's finding.

We further note the alleged discrepancy in testimony asserted by petitioner —that Willis testified at petitioner's trial that although he had his hands covering his face during the shooting, he was able to identify petitioner as the shooter, whereas Willis testified at Bryant's trial that because he had his hands over his face when the shooting occurred, he assumed petitioner was the shooter—is irrelevant since petitioner has at all times admitted he was the shooter. His defense theory is and has always been that he acted in

self-defense, not that he was misidentified as the shooter.

In sum, we find that the Magistrate Judge properly concluded that the adjudication of petitioner's claims in the state courts did not result in a decision that (1) was contrary to clearly established federal law, (2) involved an unreasonable application of clearly established federal law, or (3) was based on an unreasonable determination of the facts in light of the evidence presented in the state courts.

CONCLUSION

For the foregoing reasons, the Court overrules petitioner's Objections, adopts and approves the Magistrate Judge's Report and Recommendation, and dismisses the Petition for a Writ of Habeas Corpus. An appropriate Order follows.

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ORDER

AND NOW, this day of , 2005, upon careful and independent consideration of the pleadings and record herein, and after review of the Report and Recommendation of United States Magistrate Judge Thomas J. Rueter, it is hereby

ORDERED and DECREED as follows:

1. Petitioner James Green's Objections to the Report and Recommendation are OVERRULED;

2. The Report and Recommendation of Magistrate Thomas J. Rueter dated September 30, 2005 is APPROVED and ADOPTED;

3. The petition for a writ of habeas corpus is DISMISSED;

4. Because the petition does not make a substantial showing of the denial of a constitutional right, the Court declines to issue a Certificate of Appealability; and

5. The Clerk is DIRECTED to close this case for statistical purposes.

BY THE COURT :

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CYNTHIA M. RUFE, J.